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May 1, 2013

**VIA ELECTRONIC COURT FILING
AND ELECTRONIC MAIL**

The Honorable Edward R. Korman
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

**Re: *Tummino, et al. v. Hamburg, et al.*
Case No. 12-CV-763 (ERK/VVP)**

Dear Judge Korman:

On behalf of Plaintiffs in the above referenced action, we write in response to the letter, Notice of Motion and Motion for Stay Pending Appeal with Exhibits submitted by Defendants to the Court this evening. (ECF Nos. 91, 91-1, 91-2, 91-3 and 92.) Defendants seek a stay of this Court's Memorandum and Order, filed on April 5, 2013 (ECF No. 85), which requires that the Defendants take certain actions by May 6, 2013. Defendants have requested that this Court rule on the Motion for Stay within hours – by the end of tomorrow, May 2, 2013. Plaintiffs intend to oppose the stay, and for the reasons set forth below, respectfully request that we be granted until close of business on May 3, 2013, to do so.

Defendants, undoubtedly recognizing that their delay in seeking a stay has placed them in the untenable position of asking Plaintiffs and this Court to act with unreasonable haste, suggest that this Court grant an "administrative stay," to provide adequate time for consideration of their motion. Plaintiffs oppose Defendants' request for an "administrative stay" which, as their filing demonstrates, has no basis in law or equity.

Defendants cannot meet the procedural and legal requirements for a stay as provided under Fed. R. Civ. P. 62(a)(1) which expressly excludes an automatic stay of a "final judgment in an action for an injunction." Defendants' request for an "administrative stay" is essentially a motion for extension of time to obtain a stay before this Court, or a request to move for a stay in the U.S. Court of Appeals for the Second Circuit when they have failed to satisfy either of the

requirements to do so. *See* Fed. R. App. P. 8(a)(1), (2) (requiring Defendants to file for a stay in this Court unless they can “show that moving first in the district court would be impracticable” or where their motion has been denied by the District Court).

Although Defendants have been well aware that the time for compliance with this Court’s Order is by May 6, 2013, they have chosen, once again, to refuse to take any action to grant the Citizen Petition or to make levonogestrel-based emergency contraceptives available without a prescription and without point of sale or age restrictions within thirty days. (ECF No. 85 at 57.)

Instead, Defendants have used the past 30 days to prepare their appeals papers and consummate their approval of Teva Women’s Health’s Supplemental New Drug Application (“Teva”) with restrictions on age, an identification requirement and a point of sale restriction. As their papers make clear, they wished to rely on the Supplemental New Drug Application (“sNDA”) approval to support their stay application to willfully not comply with this Court’s Order.

Defendants have had ample time and notice to file for a stay, but now propose that, having taken this extra time to prepare their filing, Plaintiffs must prepare a response within a matter of hours. Their argument that Plaintiffs, and this Court, should now respond immediately is wholly unreasonable. Moreover, Defendants reliance on the approval of the sNDA to support their Motion for Stay requires that Plaintiffs address new facts and legal arguments beyond the scope of this Court’s Memorandum and Order.

There is no emergency here, except for that created by the Defendants own delay tactics. Plaintiffs, therefore, respectfully request until close of business on Friday, May 3, 2013, to file an opposition to Defendants’ Motion for Stay Pending Appeal.

Since Defendants have created the delay here, Plaintiffs should not be prejudiced. Moreover, since Defendants have stated they intend to file an appeal of any denial of a stay by this Court, Plaintiffs should be given the opportunity to adequately respond for purposes of fair appellate review.

Thank you for Your Honor’s time and consideration concerning this matter.

Respectfully submitted,

By: /s/ Andrea Costello
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